SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-137
Lower Tribunal No. 18-DR-001122

MICHAEL MANNELLA,

Appellant,

v.

LEAH MANNELLA,

Appellee.

Appeal from the Circuit Court for Lee County.
John S. Carlin, Judge.

March 10, 2023

TRAVER, J.

Michael Mannella ("Former Husband") appeals the trial court's denial of his supplemental petition for modification.[1] We have jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A). The trial court did not abuse its discretion in denying Former

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

Husband's petition to reduce his child support. Competent, substantial evidence supports the trial court's conclusion that although the income of Leah Mannella ("Former Wife") had increased since entry of the parties' agreed-upon final judgment, so had Former Husband's. Separately, the record supports the trial court's finding that Former Husband had voluntarily modified his employment to persuade the trial court to terminate his child support obligation. Accordingly, we affirm.

In so doing, we address the parties' shared confusion over a petitioner's burden of proof when seeking to reduce an agreed-upon child support amount. We conclude that the correct burden is a substantial change in circumstances. We certify conflict with three of our sister courts, all of whom have continued to apply the "heavier burden" standard after it was superseded by statute and then referenced as dictum in a subsequent Florida Supreme Court decision. *See* § 61.14(7), Fla. Stat. (1993); *Overbey v. Overbey*, 698 So. 2d 811, 813 (Fla. 1997); *Schmachtenberg v. Schmachtenberg*, 34 So. 3d 28, 34 (Fla. 3d DCA 2010); *Catalano v. Catalano*, 787 So. 2d 243, 245 (Fla. 2d DCA 2001); *Knight v. Knight*, 702 So. 2d 242, 243–44 (Fla. 4th DCA 1997).

I. Background

The parties, who have one teenage child, divorced in April 2018. The trial court's final judgment incorporated their marital settlement agreement. The final

judgment required Former Husband to pay Former Wife $2,000 per month in durational alimony and $250 per month in child support.

In September 2020, Former Husband filed a supplemental petition, seeking to modify his child support obligation. He cited three bases: 1) a substantial increase in Former Wife's income; 2) a "substantial[] decline" in his income that "significantly and permanently reduced [his] ability to meet the present needs of the child"; and 3) a difference between his existing obligation and that contained in his proposed guidelines of 15% or $50, whichever was greater. *See* § 61.30(1)(b), Fla. Stat. (2020). He sought child support from Former Wife retroactive to the date he filed his petition.

At trial, Former Husband testified that when the trial court entered the parties' agreed-upon final judgment, he owned an information technology consulting business called Ghott. He was self-employed throughout the parties' seventeen-year marriage up until less than three months before the modification trial; at that time, he began a salaried job with a former client. While self-employed, he did not receive a regular paycheck. Rather, he took draws and paid his personal expenses from the Ghott business account.

Former Husband's financial affidavit, executed before the parties divorced, showed $5,872 in gross monthly income. But the child support guidelines worksheet attached to the final judgment—which ultimately provided the basis for the $250 per

month Former Husband paid—showed his gross monthly income was $8,164.44. Former Husband initially said he did not know why the amounts were different but later conceded that Ghott paid numerous personal expenses over the years, including groceries, restaurant purchases, and three separate credit cards. Former Wife confirmed that the increased amount reflected add backs to factor the personal expenses Ghott had paid for Former Husband.

To support his supplemental petition, Former Husband filed a financial affidavit in October 2020. He ultimately acknowledged that this financial affidavit understated how much money he continued to receive from Ghott in 2020. Indeed, he admitted at trial that his income had increased since he filed his supplemental petition, and he abandoned this ground for modification.

The October 2020 financial affidavit also showed income from a new company. In June 2019, Former Husband started a new business called Techiest, in which he was the 72.5% owner. The other owner is no longer involved in the company, and Former Husband is Techiest's only financial investor. Former Husband testified that he received a $2,200 monthly paycheck from Techiest from April 2020 to June 2021. He swore that he had drawn his last Techiest check a few months before trial, and that he no longer works there. Further, he said that while he was sure he would receive additional monetary benefits from Techiest by the end of 2021, he was "not expecting it to be a lot."

By 2021, Former Husband had transitioned all but one Ghott client to Techiest. Three months before trial, the remaining client, Global vCard, hired Former Husband as an employee, and Former Husband closed Ghott. Global vCard pays Former Husband $7,500 per month in gross income, or $90,000 per year. Former Husband explained that one of the reasons he closed Ghott, founded Techiest, and joined Global vCard was to "simplify" the process for calculating his income for child support purposes.

Former Wife testified that she was unemployed before the parties divorced. By the final judgment's entry, she made $12 per hour at a property management company. She then began working in banking. At the time of trial, she worked at Truist Bank, earning $40,000 annually ($19.26 per hour) in gross income. She also receives $2,000 per month in durational alimony for a total of $64,000 per year in gross income. When the parties divorced, Former Wife did not pay for health insurance. She now pays for her health, vision, and dental insurance. She also pays for after-school childcare expenses.

The trial court issued a comprehensive supplemental final judgment denying Former Husband's petition. It made detailed factual findings, all of which the record supports. The trial court found Former Wife's testimony on the discrepancy in Former Husband's income between his pre-divorce financial affidavit and the parties' child support guidelines worksheet more credible. Specifically, it noted

Former Husband's regular practice of having Ghott pay his personal expenses explained why Former Husband's gross income was higher than he listed in his financial affidavit. The trial court also found that Former Husband received income throughout the litigation on the supplemental petition from Ghott (until it closed) and Techiest. And it noted that Former Husband's income had increased since the parties' divorce.

The trial court's final two findings are the most significant. It declared that "Former Husband continues to have the benefit of business income from Techiest." And it concluded that Former Husband "voluntarily modified his employment in the hopes of the [trial court] terminating his child support obligation and ordering Former Wife to pay him child support." Applying these findings, the trial court ruled there had not been a substantial change in circumstances since the parties' final judgment.

II. Standard of Review and Petitioner's Burden on a Petition to Modify Child Support

We review a trial court's order denying a petition to modify child support for an abuse of discretion, and we will not disturb the trial court's factual findings if they are supported by competent, substantial evidence. *See Fredman v. Fredman*, 917 So. 2d 1038, 1042 (Fla. 2d DCA 2006). A trial court may modify a judgment containing an agreed child support payment retroactive to the filing date of the petition to modify when "the circumstances or the financial ability of either party

changes." § 61.14(1)(a), Fla. Stat. (2020). To modify child support, a petitioner must prove three elements: 1) a substantial change in circumstances, 2) that was not contemplated at the time of the divorce judgment's entry, and 3) that is sufficient, material, involuntary, and permanent in nature. *See Poe v. Poe*, 63 So. 3d 842, 843 (Fla. 5th DCA 2011) (citing *Pimm v. Pimm*, 601 So. 2d 534, 536 (Fla. 1992)). Whether the underlying support order arises from an agreed-upon resolution or a court-imposed order, a petitioner's burden of proof is identical. *See* § 61.14(7), Fla. Stat. (2020).

III. The Inapplicability of the "Heavier Burden" Standard

The parties both argue the judicially created "heavier burden" standard applies. Their arguments are misplaced because this standard has been superseded by statute. *See Tietig v. Boggs*, 602 So. 2d 1250, 1251 (Fla. 1992); § 61.14(7), Fla. Stat. (1993).

The *Tietig* Court evaluated a trial court's denial of a petition to modify a judgment to increase child support. 602 So. 2d at 1251. It discussed a Fourth District decision that had explored the genesis of the "heavier burden" standard and ultimately discarded it, finding that statutory provisions dating back to at least 1935 drew no distinction between child support obligations imposed by settlement or order. *Id*. (citing *Bernstein v. Bernstein,* 498 So. 2d 1270, 1272 (Fla. 4th DCA

1986)).[2] But instead of adopting *Bernstein's* rationale, *Tietig* drew a different distinction between the standard to increase child support—a substantial change in circumstances—and the standard to decrease it. *Id*. In the latter situation, the *Tietig* Court decreed that a petitioner seeking to decrease his child support obligation would bear a "heavier burden" if the obligation arose from a marital settlement agreement. *Id*.

Following *Tietig*, the Florida Legislature promptly amended section 61.14 to eliminate this distinction. It declared that "[w]hen modification of an existing order of support is sought, the proof required to modify a settlement agreement and the proof required to modify an award established by court order shall be the same." § 61.14(7), Fla. Stat. (1993). While this unambiguous statutory amendment should have settled the issue, a subsequent Florida Supreme Court case has sparked debate among the district courts about the "heavier burden" standard's continued applicability. *See Overbey*, 698 So. 2d at 813.

Overbey evaluated the narrow issue of whether a parent's voluntary reduction in income to attend law school could support a reduction to his child support obligation. *Id*. at 812; *see also Van Looven v. Van Looven*, 100 So. 3d 148, 150 (Fla. 1st DCA 2012). The *Overbey* Court held that "a downward modification of child

[2] The *Bernstein* court traced the heavier burden standard's origins to a Second District decision that imported the concept from alimony cases. *See* 498 So. 2d at 1271 (citing *Burdack v. Burdack*, 371 So. 2d 528, 529 (Fla. 2d DCA 1979)).

support for educational enhancement should be ordered only if the modification is found to be in the best interests of the child" and concluded that the petitioner had not met this standard. *Overbey*, 698 So. 2d at 812. To support this conclusion, it found that sections 61.13 and 61.14, Florida Statutes, should be read *in pari materia*. *Id*. at 814. Section 61.14 gives *parties the ability to seek* child support modification if there has been a change in circumstances. Section 61.13 gives *trial courts the power to modify* child support if it is in the child's best interests or if a substantial change in circumstances has occurred. The *Overbey* Court first affirmed that a substantial change in circumstances is "[g]enerally . . . a fundamental prerequisite" to petitioning for a child support modification, and that a change in circumstances must be "significant, material, *involuntary*, and permanent in nature to warrant a reduction in payment." *Id*. at 813, 814. Then, it found that no substantial change in circumstances had occurred because the parent's decision to attend law school was, of course, voluntary. *Id*. at 814. Nevertheless, the *Overbey* Court reasoned that section 61.13 allows trial courts to evaluate on a case-by-case basis whether a parent's voluntary income reduction to pursue educational opportunities is in a child's best interest. *Id*. at 815.

Overbey also reiterated the "heavier burden" standard and stated that "when, as in the instant case, the child support was based on an agreement by the parties that was subsequently incorporated into an order, a heavier burden rests on the party

seeking a reduction than would otherwise be required." *Id*. at 814 (citing *Tietig*, 602 So. 2d at 1250). But this was obiter dictum, and it therefore had no precedential value. *Overbey* invoked a "best interests of the child" standard in the limited context of its holding, and the "heavier burden" standard had no bearing on its decision. *See id.* at 814–15; *see also Pell v. State*, 122 So. 110, 112 (Fla. 1929) (explaining that court's discussion not essential to decision is mere obiter dictum, and thus, without force as precedent); *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) (defining obiter dictum as "remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in a case or essential to its determination"). Indeed, the *Overbey* Court emphasized that it was not "promulgating a bright-line rule to be applied in these cases." 698 So. 2d at 815.

Nevertheless, three of our sister courts viewed this dictum as a holding, and they have subsequently applied the "heavier burden" standards in cases where a petitioner seeks to decrease agreed-upon child support. *See, e.g.*, *Knight*, 702 So. 2d at 243–44; *Catalano*, 787 So. 2d at 245; *Schmachtenberg*, 34 So. 3d at 34. The *Knight* court presumed that even though *Overbey* did not analyze—or even discuss—the statutory amendment to section 61.14, in *Tietig*'s wake, it must have known about it. *See* 702 So. 2d at 243. The *Catalano* court plainly described *Overbey*'s reference to the "heavier burden" standard as a "holding." *See* 787 So. 2d at 245. And the *Schmachtenberg* court merely referenced the "heavier burden"

standard in a sentence citing to *Overbey*. *See* 34 So. 3d at 34. Each of these decisions treat *Overbey*'s "heavier burden" reference, in dicta, as a rule of law, despite section 61.14(7)'s clear directive.

At least one court has recognized that *Overbey*'s proclamation has been superseded by section 61.14(7). *See Ellisen v. Ellisen*, 150 So. 3d 1270, 1271 n.2 (Fla. 5th DCA 2014). *Ellisen*, however, addressed a supplemental petition to decrease alimony, which falls outside the statutory definition of "support" in section 61.14(7) in non-Department of Revenue proceedings. *Id*. at 1270; § 61.046(22)(b), Fla. Stat. (Supp. 2001) (defining "support" as "[c]hild support only in cases not being enforced by the Department of Revenue").[3] Meanwhile, courts throughout the state have continued to cite the "heavier burden" standard in child support cases. *See, e.g., A.G.W. v. C.L.C.*, 48 Fla. L. Weekly D388, D389 (Fla. 2d DCA Feb. 17, 2023); *Arrington v. Arrington*, 316 So. 3d 417, 419 (Fla. 1st DCA 2021); *Medalie v. Sparks*,

[3] Other courts have not applied the "heavier burden" standard, instead citing to section 61.14(7)'s effect. *See Inman v. Inman*, 260 So. 3d 555, 557 n.2 (Fla. 2d DCA 2018); *Garvey v. Garvey*, 138 So. 3d 1115, 1120 (Fla. 4th DCA 2014). But these cases also addressed alimony modifications. *See id*. The First District questioned the standard's continued applicability in dictum, but it declined to reach the issue's merits because the appellant did not preserve it for appeal. *See Knowlton v. Knowlton*, 282 So. 3d 154, 155–56 (Fla. 1st DCA 2019) (citing *Credit Counseling Found., Inc. v. Hylkema*, 958 So. 2d 1059, 1061 (Fla 4th DCA 2007) (holding that when party fails to object to trial court's assignment of burden of proof and when party willingly acquiesces to trial court's imposition of burden of proof, party cannot argue for first time on appeal that trial court improperly assigned burden of proof)).

278 So. 3d 151, 151 (Fla. 4th DCA 2019); *Pohlmann v. Pohlmann*, 703 So. 2d 1121, 1125 (Fla. 5th DCA 1997).

Here, the trial court applied the proper standard—a substantial change in circumstances—in ruling on Former Husband's petition to reduce his child support. The "heavier burden" standard does not apply. *See* § 61.14(7).

IV. Analysis

For two reasons, the trial court did not abuse its discretion in finding no substantial change in circumstances, even though Former Wife's income had increased since the parties' divorce. *See Taylor v. Wojtusik*, 695 So. 2d 457, 458 (Fla. 4th DCA 1997) (explaining that former wife's increased income was not dispositive of former husband's supplemental petition to modify child support). First, Former Husband's income had also increased, and the record contains ample evidence supporting the trial court's conclusion that it increased more than he testified. To this end, we must credit the trial court's conclusion that Former Husband's increased wealth was not limited to his salary at Global vCard. The trial court found that Former Husband still had the benefit of business income from Techiest. Former Husband received $2,200 per month in payments from Techiest until less than three months before trial, when, as the only involved owner, he stopped paying himself. Former Husband spent the parties' entire marriage, and all but three months before the trial on his supplemental petition, supporting himself

through draws and in-kind payments from Ghott. Former Husband also testified that he expected additional monetary benefits from Techiest by the end of the year. The trial court could certainly believe Former Husband's testimony that he would receive more money from Techiest and disbelieve his assertion that it would "not be a lot." Indeed, the trial court had the benefit of Former Husband's own financial affidavit supporting his petition to modify. In it, he swore to a gross income at Ghott in October 2020 that illustrated his "significantly and permanently reduced ability" to pay child support. At trial, however, he conceded that he ultimately made more money at Ghott that year than he had when the parties divorced.

Second, the record also supported the trial court's conclusion that Former Husband closed Ghott, opened Techiest, and started at his new employer to convince the trial court to eliminate his child support obligation. The trial court was not required to decrease Former Husband's child support obligation if his decline in income was voluntary. *See Overbey*, 698 So. 2d at 813 (stating that substantial change in circumstances must be involuntary); *Kozell v. Kozell*, 142 So. 3d 891, 894 (Fla. 4th DCA 2014) (determining that findings that former husband had access to greater income than shown on his financial affidavit and control as to when he received it supported conclusion that change in circumstances was voluntary and did not support modification).

V. Conclusion

For these reasons, we affirm the trial court's denial of Former Husband's supplemental petition. We certify conflict with *Schmachtenberg v. Schmachtenberg*, 34 So. 3d 28, 34 (Fla. 3d DCA 2010), *Catalano v. Catalano*, 787 So. 2d 243, 245 (Fla. 2d DCA 2001), and *Knight v. Knight*, 702 So. 2d 242, 243–44 (Fla. 4th DCA 1997), solely on the standard of proof required for downward modification of a child support obligation established by agreement.

AFFIRMED; CONFLICT CERTIFIED.

NARDELLA and SMITH, JJ., concur.

Matthew P. Irwin and Peter B. Sekulic, of Men's Rights Law Firm, Cape Coral, for Appellant.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED